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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 751

WEST TEXAS UTILITIES COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* order of the court below, enforcing without opinion the order of the National Labor Relations Board, is reported at 218 F. 2d 824. The findings of fact, conclusions of law, and order

of the Board (R. 150-221)[1] are reported at 108 N. L. R. B. No. 80.[2]

JURISDICTION

The judgment of the court below was entered on February 4, 1955. A petition for rehearing *en banc* was denied on March 22, 1955. The petition for a writ of certiorari was filed on April 27, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Under a contract between petitioner and Southwest Electric Company, whereby the latter undertook to perform certain construction work on petitioner's property, petitioner reserved the right to compel Southwest to remove any employee from the work. Pursuant to this clause petitioner compelled Southwest to refuse employment to Alton Ray because of Ray's union activities. The first question presented is whether in so doing petitioner violated Section 8(a)(1) and (3) of the Act.

2. Whether the court below committed reversible error by denying petitioner's motion for rehearing

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[1] The symbol "R" refers to the Transcript of Record printed as Volume I pursuant to the rules of the court below; the symbol "B.A." refers to the appendix to the brief filed by the Board in the court below.

[2] The only portions of the Board's findings, conclusions, and order now pertinent to this litigation are to be found at R. 158-163, 198-213. The remaining portions of the intermediate report and decision deal with matters not raised in this Court or in the court below.

en banc without having promulgated rules governing *en banc* rehearings.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 13-16. 28 U. S. C. 46(c) is reprinted in the Petition, p. 3.

STATEMENT

I. The Board's Findings of Fact

In 1946, Alton S. Ray, who had worked for petitioner from 1926 to 1941, became a part-time, paid business agent and member of the negotiating committee of Local 898, International Brotherhood of Electrical Workers, AFL, hereafter called the Union (R. 198; B. A. 9, 21). Thereafter, he participated with that committee in the futile negotiations with petitioner which led to a decree directing petitioner to bargain in good faith and a further decree holding petitioner in contempt because of its disobedience.[3]

In addition to his work for the Union, Ray worked as an electrician to supplement his income (R. 198; B. A. 21). About April 28, 1951, Ray was employed by Southwest Electric Company (hereafter called Southwest) on a maintenance job which it was performing for petitioner at the lat-

[3] *West Texas Utilities Co., Inc.*, 85 NLRB 1396, 1411, enforced 184 F. 2d 233 (C.A. D.C.), certiorari denied, 341 U.S. 939; *West Texas Utilities Co., Inc.* v. *National Labor Relations Board*, 206 F. 2d 442 (C.A. D.C.), certiorari denied, 346 U.S. 855.

ter's power plant in San Angelo, Texas (R. 198; B. A. 24-25). Southwest was performing this work under an oral, cost-plus contract. The parties agreed to be governed, *inter alia,* by the following provision of a written form construction contract (B. A. 46):

> 6. ERECTION: Contractor shall provide all labor, tools, hoists, materials, scaffolding, false-work, etc., which may be necessary for the WORK, and shall take out and pay for any required permits. Contractor shall maintain a competent superintendent at the site at all times to supervise the WORK and conduct it in cooperation with purchaser or the consulting engineers, and in coordination with all other work being done on the premises. *If in purchaser's judgment it is desirable, contractor shall at purchaser's request remove any employee from the* WORK. [Emphasis added.]

About a week after Ray was so employed, petitioner's production superintendent, Hamilton, stated to Peters, vice-president of Southwest: "You know you have a man on your job that caused us considerable trouble" (R. 198; B. A. 34). Hamilton identified the man as Ray, but Peters continued to employ him (*ibid.*). Late in July, 1951, petitioner's attorney, Cain, told its vice-president, Schroeder, "to get Mr. Ray off of that job" (R. 198-199; B. A. 38). A day or so thereafter, about July 26, 1951, the project was shut down

because of a shortage of materials (R. 199; B. A. 25).

During the period of the shutdown Ray continued to be active in the bargaining negotiations which, as stated above, culminated in a contempt decree against petitioner (R. 199-202; B. A. 10-14, 36-37).

In February, 1952, Southwest resumed its maintenance work at petitioner's San Angelo power plant (R. 204; B. A. 33). In the early part of March, Hardin, who was in charge of electrical construction for petitioner, stated to Southwest's vice president, Peters: "Pete, I'd rather that you wouldn't get Curley [Ray] back to work." When Peters inquired whether there was a reason for this request, Hardin replied: "Well, not that I know of, but * * * there has been some conversation about it and I think it will cause confusion if you do" (R. 204; B. A. 30-31). Shortly thereafter, Peters advised Ray that there were "some company objections to him returning to work" (B. A. 25-26).

About March 12 Peters requested Ray to supply him with two electricians. Ray replied that he was available and would present himself for employment, and asked Peters why petitioner objected to him. Peters advised that he did not know but would try to find out. Thereafter, at a conference held on March 15, Whitaker, special engineering assistant to petitioner's president, advised Peters that petitioner objected to Ray "because he was a union organizer and because of threats that he had

made at a recent union negotiation against the Company."[4] Whitaker added that "if [Southwest] were forced to use help that had made a threat against the company, that he would rather do it with company employees." On the same day, Peters informed Ray of petitioner's objections to him. (R. 204-205; B. A. 26-29.)

Pursuant to Peters' request for two electricians, Ray reported to Peters on March 17, 1952, prepared to go to work. Peters, however, advised Ray that he could not put him to work for the reasons previously stated. At Ray's request, Peters repeated to other officials of Southwest that Ray could not be put to work because of the objections stated by petitioner, namely, that Ray was a union organizer and had made threats against petitioner during negotiations. (R. 205-206; B. A. 19-20, 29-30, 41.)

II. The Board's Conclusions and Order

On the basis of these facts, the Board found that petitioner "demanded the nonemployment of Ray because he was an active official of the same union which had organized the [petitioner's] employees and with which union the [petitioner] had labor disputes involving unfair labor practices before this Board and the Courts" (R. 160). The Board further found that even though there was no direct employer-employee relationship between Ray and

[4] The "threats" consisted of a statement that Ray would campaign for municipal ownership of the public utility (R. 203; B.A. 14).

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petitioner, the latter had violated Section 8 (a)(3) and (1) of the Act by causing the discrimination against Ray (R. 160-162).

The Board ordered petitioner to cease and desist from discouraging membership in any labor organization by discrimination, and from in any other manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act. Affirmatively, the Board ordered petitioner to notify Southwest that it withdraws all objection to the employment of Ray on any job that Southwest may have on petitioner's property, to make Ray whole for any loss of pay he may have suffered by reason of the discrimination against him, and to post appropriate notices. (R. 162-165.)

III. Proceedings in the Court Below

The court below enforced the Board's order without opinion. Petitioner thereupon filed a "Motion for Rehearing," and within a day thereafter filed a "Supplemental and Amended Motion for Rehearing." The second document directed the court's attention to the *Western Pacific Railroad Case*, 345 U. S. 247, pointed out that the Fifth Circuit had not since that decision "amended its rules pertinent to procedure for applications for rehearing *en banc*," and asked (a) that the Fifth Circuit sit *en banc* to determine whether rehearing be granted and (b) that the case be reheard before the court *en banc*. The court denied rehearing on March 22, 1955.

ARGUMENT

1. In holding petitioner liable under Section 8(a)(1) and (3) for the discrimination against Ray, the Board and the court below correctly applied the settled rule that one who exercises control over whether a person should be employed is an "employer" or "an agent of an employer" within Section 2 (2) of the Act, and is responsible for his own discriminatory conduct. *National Labor Relations Board* v. *Long Lake Lumber Co.*, 138 F. 2d 363, 364 (C. A. 9); *National Labor Relations Board* v. *Gluek Brewing Co.*, 144 F. 2d 847, 853 (C. A. 8); *National Labor Relations Board* v. *New Madrid Mfg. Co.*, 215 F. 2d 908, 913 (C. A. 8); *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67, 71-72 (C. A. 3); *Butler Bros.* v. *National Labor Relations Board*, 134 F. 2d 981, 985 (C. A. 7), certiorari denied, 320 U. S. 789. The application of this settled principle to the particular facts of this case raises no question warranting review.

Moreover, even if petitioner could not be considered Ray's "employer," it would none the less be liable for having caused him to lose employment. The statute expressly provides in Sections 2(3) and (9) that the "employees" embraced within its protection are not "limited to the employees of a particular employer" and that a labor dispute can arise "regardless of whether the disputants stand in the proximate relation of employer and employee." Similarly, Section 8 (a) (1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise

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of [their] rights * * *"; unlike other provisions of the Act (see, *e. g.*, Sections 8 (a) (5) and 8 (b) (4)(B) and (C)), the prohibition is not expressed in terms of "his" employees. Similarly, Section 8 (a) (3) contains nothing which limits the protection of the section to employees of the employer guilty of the discrimination. Reading Section 8 (a) (1) and (3) in the light of Section 2 (3), it is clear that petitioner is liable for its interference with Ray's rights and for its discrimination against him, for he is an "employee" within the meaning of the Act, and the term is not "limited to the employees of a particular employer." See *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 191-192; *Austin Company*, 101 NLRB 1257, 1258-1259.

Contrary to petitioner's suggestion (Pet. 9-10), the decision below is not in conflict with the decision of the same court in *National Labor Relations Board* v. *Steinberg*, 182 F. 2d 850, or with *National Labor Relations Board* v. *Carroll*, 120 F. 2d 457 (C. A. 1). In *Steinberg* the court held that certain muskrat trappers were independent contractors, and hence were not within the class of "employees" protected against discriminatory discharge; the case is not relevant here, where the person discharged is manifestly an "employee" and not an "independent contractor."[5] In *Carroll* the court upheld the Board's finding that one who carried mail pursuant to a contract with the Post

[5] Two of the three judges who comprised the *Steinberg* court sat on the court below in the instant case.

Office Department was himself the employer of the truck drivers he hired, notwithstanding that the postmaster retained power to require suspension of a driver for inefficiency or other serious delinquency. Apart from the marked differences between the contracts in this case and in *Carroll,* it may be noted that petitioner, unlike the Post Office Department, is not excluded by statute from the category of an "employer," and that the holding in *Carroll,* if applicable here, would establish only that Southwest was likewise liable as an employer under the Act. Since no charge was filed against Southwest, the Board properly proceeded to grant full relief against the only respondent brought before it. *Radio Officers' Union* v. *National Labor Relations Board,* 347 U. S. 17, 52-55.

2. Equally without merit is the contention that the court below erred in denying petitioner's supplemental motion for rehearing *en banc* "without a proper presentation of the matter to the whole court for determination" (Pet. 7). This is not a case like *Western Pacific Railroad Case,* 345 U. S. 247, 263, 265, where the request for rehearing *en banc* was denied by the division which had heard the appeal "as being without authority in law or in the rules or practice of the court", and it then appeared "that the full bench [had] refused completely to consider the merits of the *en banc* request." On the contrary, petitioner implicitly recognizes (Pet. 8) that the request was duly received and rejected on its merits, as befitted the relative simplicity of the case. For this action, in-

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volving essentially factual issues (here abandoned by petitioner) and well settled legal principles, and provoking no semblance of doubt or dissent in the court below, is in no way comparable to the "difficult and complicated litigation" involving seventeen million dollars on which the court of appeals divided in the *Western Pacific* case.

The Fifth Circuit has demonstrated its readiness in an appropriate case to sit *en banc*. See, *e. g., St. Johns River Shipbuilding Co.* v. *Adams,* 164 F. 2d 1012; *Kennedy* v. *Silas Mason Co.,* 164 F. 2d 1016. While it is true, as petitioner states (Pet. 7), that the court has not embodied its practice relating to *en banc* hearings in formal rules,[6] the same is true for seven of the other ten courts of appeals.[7] For the instant case, at least, it is sufficient that such hearings are available in the court below, that petitioner exercised fully its right to suggest that the case be heard *en banc*, and that the request was properly denied on its plainly unsubstantial merits.

---

[6] The practice of the court below is reported in 21 Chi. L. Rev. 447, 452: "The Third, Fifth, Ninth, and District of Columbia Circuits provide that any member of the panel who feels that the case should be heard *en banc* may consult the other circuit judges. * * * In the Fifth Circuit the panel judge presents the matter to the Chief Judge who will contact the other members of the court if he agrees to the *en banc* hearing."

Cf. In re Sacher, 206 F. 2d 358, 362, where the Presiding Judge of the Second Circuit, which like the court below has no published rule governing *en banc* sessions, polled the circuit judges as to whether they desired to hear the case *en banc*.

[7] Only the Third, Eighth and Ninth Circuits have rules expressly referring to the procedures for convening themselves *en banc*. See the Third Circuit's Rule 5(3), Eighth Circuit Rule 15(e), and Ninth Circuit Rule 23.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1955.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or

in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a

condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: * * * (B) forcing or requiring any other employer to recognize or

bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

* * * * *

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